INDEX.

	PAGE
Opinions below	1
Restatement of the case	2
Summary of Argument	13
Argument	16
I The decision of the Circuit Court of Appeals in this case does not conflict with the applicable decisions of this Court, of other Federal courts, of State courts, or of Federal Administrative Tribunals.	16
A. The Respondents did not fix prices	21
B. The restraint of trade, if any, was reasonable.	23
II This case does not present important questions of Federal law which have not, but should be settled by this Court	24
Conclusion	25

TABLE OF CASES.

Cargill v. Board of Trade, CEA Docket No. 6..... 20, 24

Chicago Board of Trade v. U. S. (1918) 246 U. S. 231 .....12, 14, 18, 24

Crowley v. Commodity Exchange, Inc. (1944) 141 F. (2d) 182 .....14, 15, 18, 22, 24

Daniel v. Board of Trade (1947) (C. C. A. 7) 164 F. (2d) 815 .....14, 15, 19, 24

Garcia Sugars v. N. Y. Coffee & Sugar Exchange, Inc. (1938) 7 N. Y. S. (2d) 532..... 14, 20

Rice, et al v. Board of Trade of the City of Chicago (1947) 331 U. S. 247..... 13

Thomson v. Thomson (1925) 315 Ill. 521; 146 N. E. 451 .....11, 13, 14, 15, 19, 24

U. S. v. New York Coffee and Sugar Exchange, Inc. (1924) 263 U. S. 611.....14, 16, 17, 24

U. S. v. Socony-Vacuum Oil Co., Inc. (1940) 310 U. S. 150 ..... 18, 22

STATUTES.

Emergency Price Control Act of 1940, 50 U. S. C. A. Sec. 901 et seq..... 4

Stabilization Act of 1942, 50 U. S. C. A., Sec. 961 et seq. 4

Commodity Exchange Act, 7 U. S. C. A. 1-17a ..3, 20, 23, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 671

CARGILL, INCORPORATED,
Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINIONS BELOW.

This is a suit for injunction and triple damages under the anti-trust laws. The District Court granted respondents' motion to dismiss on the ground that the Amended and Supplemental Complaint failed to state a claim upon which relief could be granted. On appeal the Circuit Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court. The opinion of the District Court (R. 49-52) is not reported. The opinion of the Circuit Court of Appeals (R. 69-72) is reported in 164 F. 2d 820.

RESTATEMENT OF THE CASE.

The petitioner, Cargill, Incorporated, by its Amended and Supplemental Complaint, challenges the validity under the anti-trust laws of certain emergency regulations which were adopted by the board of directors of the Board of Trade of the City of Chicago in May and June, 1946, pursuant to an emergency rule of that exchange (R. 28). On May 12, 1946, the Board of Trade at the request of the Federal Government, adopted an emergency regulation which provided that there be no trading in certain outstanding grain futures contracts, except for the purpose of liquidation at prices then prevailing under the old governmental price ceilings for grains (R. 35-36, 43-44). The Government had made this request in anticipation of the substantial increases in the ceiling prices for grains, which it had ordered to become effective on May 13, 1946 (R. 34-35, 43). For reasons stated below, this Regulation was rescinded (R. 44, 45) by the Board of Trade on May 31, 1946, before any change of position on the part of petitioner or any injury to it. On June 13, 1946, confronted by another emergency, the incapacity of the exchange to function as a free, open and orderly market in certain grains because of unusually large exports for world famine needs, the Board of Trade adopted an emergency regulation which closed the market to trading in these grains for delivery in 1946 and early 1947, and ordered outstanding futures contracts calling for such deliveries to be settled by monetary payments based upon closing market quotations on June 13th (R. 39, 46-47). It is these Regulations which the petitioner says violated the anti-trust laws, and upon which it bases its claim for $10,624,867.50 in damages and injunctive relief (R. 42).

Petitioner's pleading states with particularity the following facts:

Petitioner is a large dealer in grain (R. 30-31). The respondents are the Board of Trade of the City of Chicago, the Board of Trade Clearing Corporation, and their respective officers, directors and managers (R. 29-30).

On and prior to May 12, 1946, petitioner contracted to purchase in the grain market at Chicago approximately 5,000,000 bushels of grain at specified prices for delivery during the months of May, June, September and December 1946 (R. 34). Petitioner entered into these "exchange" contracts, or "futures" contracts, for the purpose of acquiring grain and to hedge its "cash grain" commitments (R. 30, 36-37, 40).

The grain market at Chicago is the largest in the world (R. 31). It is conducted as an organized exchange by the respondent, Board of Trade of the City of Chicago, and has been designated a contract market under the Commodity Exchange Act, 7 U. S. C. A., Sec. 7 (R. 31). The respondent, Board of Trade Clearing Corporation, is an affiliate of the Board of Trade and operates the "clearing house" of the exchange (R. 29, 33).

Petitioner is not a member of the Board of Trade (R. 29). Petitioner makes and "settles" its futures contracts in the grain market at Chicago through members of the Board of Trade and of the Clearing Corporation who act as agents for petitioner's brokers (R. 37, 38). Under the rules of the Board of Trade and of the Clearing Corporation, all futures contracts entered into in the grain market at Chicago, whether made for members of the Board of Trade or for non-members, are required to be "cleared" through the clearing house operated by the Clearing Corporation (R. 33).

On and prior to May 8, 1946, grain prices were subject to price ceilings established by the Office of Price Administration and the Secretary of Agriculture under applicable Federal statutes (R. 34).[1] On May 8th, the Office of Price Administration, the Office of Economic Stabilization and the Secretary of Agriculture jointly ordered a substantial increase in the maximum prices per bushel for certain grains effective Monday, May 13th—corn 25c, wheat 15c, rye 10c, barley 9c and oats 5c (R. 34-35, 43). Also on May 8th, coincident with the public announcement of this order, the three governmental agencies made request of and recommended to the governing boards of grain exchanges throughout the country that "all futures contracts open at the close of business on May 11th, be settled at the then applicable ceiling prices" (R. 43).

At the time of this governmental request and recommendation, and at all other times important herein, there was in full force and effect an "emergency rule" of the Board of Trade of the City of Chicago, Rule 251, which provides, as follows:

> "251. Emergencies. The Board[2] shall have power to declare any day to be a holiday or to close the Exchange or to stop trading in any security or in any of the future contracts of any commodity, by reason of any emergency or otherwise, and to make such Regulations in regard to deliveries and settlement prices as it may deem proper because thereof. All Exchange contracts shall be subject to the exercise of such power. Such contracts shall also be subject to the exercise by the Clearing House of the powers reserved to the Clearing House by its Charter, By-Laws, and Regulations" (R. 9).[3]

---

1 Emergency Price Control Act of 1940, 50 App. U.S.C.A. sec 901 *et seq.*, and the Stabilization Act of 1942, 50 App. U.S.C.A., sec. 961 *et seq.*

2 The "Board" mentioned in Rule 251 is the board of directors of the Board of Trade.

3 The emergency rule is stated *verbatim* in the record, page 9, and in the petition for certiorari, page 5.

On Sunday, May 12, 1946, following the request and recommendation of the governmental agencies, the board of directors of the Board of Trade adopted Regulation 1894 (R. 35-36, 43). This Regulation was an interim measure (R. 43). It stated that the board of directors desired to comply "so far as possible" with the request of the Government for settling outstanding futures contracts (R. 43). The regulation ordered, in substance and effect, that "until further notice", all trading in grain futures contracts outstanding on the Chicago exchange on May 11, 1946, be stopped, except trading "for the purpose of liquidation"[4] at or below the old ceiling prices in effect on May 11th; that in the event it thereafter should become necessary for the board of directors to assess penalties against the sellers on these futures contracts for their failure to deliver these grains, the board in making such assessments would give no consideration to the May 13th increase in the governmental price ceilings for grains; that on and after May 14, 1946, futures trading on the Chicago exchange would be permitted in grains for delivery in specified *new* delivery months, during 1946 and 1947, at prices under the *new* governmental price ceilings for grains (R. 36, 43).

Regulation 1894 became operative on May 13, 1946 (R. 36). Between May 12 and May 31, 1946, the respondent directors of the Board of Trade requested the Office of Price Administration, the Office of Economic Stabilization, and the United States Department of Agriculture to issue a directive which would order the grain exchanges to carry out the governmental policy which had been expressed by the Board of Trade in Regulation 1894.[5] The governmental agencies found that they could not issue such

[4] Exchange contracts made by members for themselves or for nonmember principals may be liquidated by the setting off of purchases against sales upon clearance. Rules 310, 315 of the Board (R 33, 34).

[5] See petition for certiorari, p. 4, footnote, and R. 45.

a directive and refused to do so (R. 45).[6] During this same period, the Clearing Corporation received notification of impending defaults by sellers on outstanding futures contracts calling for the delivery of corn, oats and barley in May 1946[7] (R. 44).

On May 31, 1946, the board of directors of the Board of Trade adopted Regulations 1897 and 1898 under the emergency rule (R. 37, 44, 45). Regulation 1897 adverted to the emergency which had arisen by reason of the sellers' defaults on the May futures contracts, and ordered, in substance and effect, that the defaults be settled by monetary payments by the contract sellers, through the Clearing Corporation, to the contract purchasers, based upon the prevailing prices under the *new* maximum prices established by the Government on May 13th (R. 37, 44). Thus Regulation 1897 repealed that part of Regulation 1894 in which the board of directors had announced that until further notice it would give no consideration to the May 13th increase in governmental price ceilings in assessing penalties for defaults against contract sellers (R. 36, 43).

In Regulation 1898, the board of directors stated that it had adopted Regulation 1894 pursuant to the request and recommendation made to all grain exchanges on May 8th by the three governmental agencies; that the board of directors had asked these agencies to issue a directive embodying the governmental policy carried out by Regulation 1894, but that these agencies had indicated they could not do so; and that the board had reconsidered its interim action expressed in Regulation 1894 (R. 45). Regulation 1898

---

[6] See petition for certiorari, p. 4, footnote, and R. 45.

[7] Rule 284 of the Board of Trade provides that delivery of grain on a futures contract must be made on the last business day of the delivery month, if not previously delivered (R. 33-34). The May defaults were the first defaults by sellers on futures contracts after the adoption of Regulation 1894.

ordered that Regulation 1894 be repealed, that trading on the Chicago Exchange in all futures contracts should continue for all purposes without limitation in any case to trading for the purpose of liquidation, and that all trading in grains in the grain market at Chicago would be at prices under the *new* governmental price ceilings (R. 37, 45).

The petitioner does not allege or claim that it changed its position in the market in the period intervening between the adoption and the repeal of Regulation 1894. To the extent that the contract sellers on some of its futures contracts defaulted in their May deliveries, petitioner was entitled by virtue of Regulation 1897 to receive from the defaulters through the Clearing Corporation, petitioner's agents and brokers, a monetary settlement based on the *new* maximum prices established on May 13th and in effect on May 31, 1946 (R. 37).

On June 4, 1936, the Clearing Corporation notified all "clearing members" of the Board of Trade that because of the institution of legal action in the courts challenging the validity of Regulations 1897 and 1898,[8] all moneys paid over to them under the provisions of these regulations were to be returned in the event either or both of the Regulations ultimately were held invalid by the courts (R. 38). In consequence, the members of the Clearing Corporation who acted as agents for petitioner's brokers in carrying out petitioner's futures transactions on the exchange either failed to pay over to petitioner the moneys payable under Regulations 1897 and 1898, or paid over such moneys to

---

[8] The legal action in question had no reference to the instant suit, but to an action brought by the "shorts," or contract sellers against the Board of Trade in the United States District Court for the Northern District of Illinois, case No. 46-C-1059 entitled *"Robert W. Buckley*, plaintiff, v. *Board of Trade of the City of Chicago, et al*, defendants." The petitioner does not attack Regulations 1897 and 1898, but relies on them.

petitioner subject to the provisions of the notice of June 4th (R. 38, 25-26).[9]

On June 13, 1946, the board of directors of the Board of Trade took action under Rule 251 with respect to a matter unrelated to the change in ceiling prices dealt with in Regulations 1894, 1897 and 1898. Regulation 1899, adopted by the board of directors on that date, described this emergency as follows (R. 46):

> "Whereas there exists an acute and critical world food shortage which it is anticipated will continue throughout 1946 and will necessitate the continued export from the United States of whole grains and grain products in unusually large quantities; and
>
> Whereas the purchase and allocation of various grains by the United States under its programs for world famine relief has already diverted and will continue to divert from domestic trade channels large quantities of grains that otherwise would be available for millers and other processors and for the performance of grain futures contracts on this Exchange; and
>
> Whereas in consequence of the foregoing and in view of present crop and statistical data considered in connection with reported grain stocks and added demands of governmental agencies, the supply of wheat, corn, barley, and rye for domestic use and consumption will be so inadequate as to:
>
> (1) render impossible the continuance on this Exchange of a free, open and orderly market where normal competitive elements can and may operate, with respect to futures contracts calling for delivery of

[9] The Amended and Supplemental Complaint alleges not only that the members of the Clearing Corporation, but the Clearing Corporation, failed to pay these sums, etc. (R. 38). The notice of June 4, 1946, did not terminate the making of payments through the Clearing Corporation under Regulations 1897 and 1898, but merely notified clearing members that the payments made through the Clearing Corporation were subject to return to the Clearing Corporation in the event Regulations 1897 and 1898 were held invalid. The affidavit of Austen S. Cargill filed by petitioner herein and included as part of the record states that it was the members of the Clearing Corporation who were the agents of petitioner's brokers that were withholding from the petitioner the moneys paid by the defaulters through the Clearing Corporation or that were paying over such moneys to petitioner subject to the June 4th notice (R. 25-26).

wheat in July, August, September, November, and December, 1946, and in March and May, 1947, for delivery of corn in July and September, 1946, for delivery of barley in July and September, 1946, and for delivery of rye in July, September, November, and December, 1946, and in March, 1947;

(2) prevent the performance and fulfillment of such futures contracts by delivery of requisite quantities of such grains; and

(3) enable purchasers under such futures contracts, in event of the raising or removal of governmental price ceilings, to require liquidation of such futures contracts at exorbitant and extortionate prices, and

Whereas the action hereinafter ordered is required in the national public interest, and

Whereas an emergency exists, within the meaning of Rule 251,

Therefore, the Board of Directors, having found the matters set forth in the above recitals to be true, acting under the provisions of Rule 251, orders: * * *"

Regulation 1899 then ordered that all futures trading be stopped forthwith in wheat, corn, rye and barley, for delivery during 1946 and early 1947, except barley for delivery in November and December 1946 and corn and rye for delivery in early 1947 (R. 39, 47). Futures contracts outstanding at the close of trading on the exchange on June 13, 1946, and calling for such deliveries were ordered to be settled without delivery and by the payment through the Clearing Corporation of settlement prices, "which [settlement prices] shall be the closing price quotations of each of said futures on this Exchange on this day" (R. 39, 47). Regulation 1899 directed the Clearing Corporation and all members of the Board of Trade to carry out the settlement thus ordered (R. 39, 47).

As a result of the adoption and enforcement of Regulation 1899, such of petitioner's futures contracts as were within the scope of the Regulation were terminated and settled by monetary payments in accordance therewith (R. 40). Petitioner was compelled later to purchase "cash grain" wherever such grain could be found, at prices in excess of those provided in its terminated contracts (R. 40).

On June 30, 1946, the imposition under Federal statutes of maximum prices for grain, was ended, and thereafter prices for "cash grain" in the country rose substantially (R. 40). Had Regulation 1899 not been adopted, the value of petitioner's futures contracts which were terminated thereunder would have appreciated over their value on June 13th when the governmental price ceiling was in force (R. 40-41). The petitioner alleges that by reason of Regulation 1899, it sustained damages in the amount of $2,851,225 (R. 41).

The Amended and Supplemental Complaint charges that the Board of Trade of the City of Chicago, its officers and directors, and the Board of Trade Clearing Corporation, and its officers and managers, following the request and recommendation of the governmental agencies on May 8, 1946, combined and conspired in violation of the Sherman Act, 15 U. S. C., Sec. 1, "to prevent the prices of futures contracts calling for the delivery of grain * * * from reflecting the general value of such grains", "to control and fix the prices of futures contracts" and "to limit and restrict trading in grain futures contracts," for the purpose of protecting from loss contract sellers in the grain market at Chicago (R .35). The adoption by the board of directors of the Board on May 12, 1946 of Regulation 1894, the giving of notice by the Clearing Corporation on June 4, 1946 to clearing members of the Board of Trade relative to payments of moneys under Regulations 1897 and 1898,

and the adoption by the board of directors of the Board of Trade on June 13, 1946 of Regulation 1899, are alleged to constitute the parts of the charged combination and conspiracy (R. 35, 37, 39). The petitioner prays that it be awarded injunctive relief and damages in the amount of $10,624,867.50 on account of the alleged violation of the anti-trust laws (R. 41-32).

On motion of the respondents, the District Court below dismissed the cause for failure of the Amended and Supplemental Complaint to state a claim under the anti-trust laws (R. 47, 49). In the Circuit Court of Appeals, the judgment of the District Court was affirmed by a unanimous court (R. 74, 69). It held that the actions taken by the respondents under the emergency rule did not violate the anti-trust laws, but "rather than being in restraint of commerce, were in aid of commerce in facilitating future trading on the market" (R. 73). It declared that "these regulations were valid and binding upon members of the contract market. They are likewise binding upon one who, like the plaintiff, is not a member but trades on the market through members. *W. A. Thomson* v. *Alexander W. Thomson et al.*, 315 Ill. 521, 530, 146 N. E. 451, 455" (R. 72).

It rejected the charge of petitioner that the regulations amounted to "price-fixing" and were in restraint of trade. The Circuit Court of Appeals, in commenting upon the charge of price-fixing, said:

> "* * * This was not price fixing. It was the establishment of a measure of damages for the liquidation of the contracts terminated and in which there was to be no further trading. Thereafter, these contracts were not in the market for anything but settlement or liquidation upon the terms set forth in the regulations. There was no trading in these contracts at the liquidation figure, but a clearing of the way for trading. Here we have the settlement or liquidation of con-

> tracts which the parties by their duly authorized agents have terminated. The settlement is upon terms that the parties through their agents have agreed upon. Such termination and settlement is not price-fixing any more than any termination and settlement of contractual obligations by mutual agreement of the parties is price-fixing. No other trading on the market was affected by the settlement of these contracts."

and as to the contention that the action restrained trade, said:

> "Neither is the termination and settlement an illegal restraint of commerce. Almost every act of an agency such as the Board and Clearing affects or restrains commerce in some respect, but such restraints as may be within the rule of reason are not unlawful. *Board of Trade of the City of Chicago et al.* v. *United States,* 246 U. S. 231, 38 S. Ct. 242, 62 L. Ed. 683. The acts of the defendants rather than being in restraint of commerce, were in aid of commerce in facilitating future trading on the market. Only the bad faith of the defendants in the discharge of their duties under the emergency in which they purported to act can vitiate the defendants' action. No such claim of bad faith is made in this case."

SUMMARY OF ARGUMENT.

This case does not involve a combination or conspiracy by substantial business interests to restrain trade and competition by price-fixing or other means, or an effort by a person or persons to create a monopoly or substantial economic control over a trade or business in interstate commerce. This case deals with the conduct in two emergencies of a grain exchange, the responsibility for the functioning of which rests under state charter and federal statute upon the respondent Board of Trade and its governing board. *Thomson* v. *Thomson* (1925), 315 Ill. 521, 530, 146 N. E. 451, 455; *Rice* v. *Chicago Board of Trade* (1947), 331 U. S. 247, 250; 7 U. S. C., Sec. 7 (c) to (f).

The emergency regulations of the Board of Trade here assailed as violative of the anti-trust laws relate to two separate matters. In Regulation 1894, temporary recognition was accorded, following request of the Federal Government, to an announced governmental policy which sought to prevent the accrual of profits from a government-ordered increase in the established maximum prices for grains. Upon the failure of the Government to impart to its policy the force of law, and before any loss was sustained by petitioner, this Regulation was repealed. In Regulation 1899, trading on the exchange in certain grains for delivery in 1946 and early 1947 was stopped, and existing exchange contracts for such deliveries were ordered settled without delivery, because of a world food crisis which had incapacitated the exchange from continuing as a free, open and orderly market in these grains.

Thus considered, Regulations 1894 and 1899 were not violative of Section 1 of the Sherman Act. 15 U. S. C., Sec. 1. Neither their design nor their effect was to impose an unreasonable restraint upon trade in grain, or to fix the prices of grain sold in interstate commerce. Both regulations were exercises of that inherent power to close trading and provide a means for settling existing exchange contracts, vested by necessity in all commodity exchanges as a means for dealing with an emergency. *Thomson* v. *Thomson* (1925), 315 Ill. 521, 146 N. E. 451; *Crowley* v. *Commodity Exchange* (1944), 141 F. 2d 182, 185 (C. C. A. 2); *Daniel* v. *Board of Trade* (1947), 164 F. 2d 815, 819 (C. C. A. 7); *Garcia Sugars Corp.* v. *New York Coffee & Sugar Exchange, Inc.* (1938), 7 N. Y. S. 2d 532, 534 aff'd w.o.op. sub nom. *Rifkind* v. *New York Coffee & Sugar Exchange, Inc.*, 258 App. Div. 871, 16 N. Y. S. 2d 1023.

No illegal burden or restraint under the statute is imposed upon interstate commerce by the operation of rules and regulations reasonably directed to the promotion and operation of a commodity exchange. *United States* v. *New York Coffee & Sugar Exchange, Inc.* (1924), 263 U. S. 611, 619, 621; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238. *A fortiori* is this true where the regulation under attack is aimed at resolving a national emergency affecting the market. The usefulness and legality of commodity futures exchanges where business can be carried on under well-defined limitations and rules, long have been recognized by the judicial and legislative branches of the Government. *United States* v. *New York Coffee & Sugar Exchange, Inc.*, 263 U. S. 611, 619; 7 U. S. C., Sec. 1 *et seq.*

That part of Regulations 1894 and 1899 which provided for the liquidation or termination of existing exchange contracts at prevailing ceiling or market prices, did not con-

stitute "price-fixing". The prices of grains to be purchased and sold on the exchange was not fixed, nor were factors determinant of such prices eliminated. The prices contained in the existing exchange contracts which were the subject of these Regulations, were determined openly and competitively on the floor of the exchange. These Regulations merely provided measures for the settlement of existing futures contracts, the liquidation or termination of which was required in the public interest. *Thomson* v. *Thomson* (1925), 315 Ill. 521, 146 N. E. 451; *Crowley* v. *Commodity Exchange* (1944), 141 F. 2d 182, 185 (C. C. A. 2); *Daniel* v. *Board of Trade* (1947), 164 F. 2d 815, 819 (C. C. A. 7). Petitioner's contracts were subject to all rules and regulations of the exchange, including the emergency rule and regulations adopted thereunder. (*Ibid.*) The alleged loss sustained by petitioner as a result of the measures for settlement thus provided was an eventuation of an assumed risk. (*Ibid.*)

ARGUMENT.

The petition for certiorari fails to show any grounds for the granting of the writ. The decision of the Circuit Court of Appeals in this case is not in conflict with any applicable decisions of the Supreme Court or of any Circuit Court of Appeals. In fact, the decision is fully in accord with the decisions of the Supreme Court, of the other Circuit Courts of Appeals and of governmental administrative agencies. There is involved no unsettled principle of law of wide general application. Within the limited scope of this controversy, the decision is sustained by legal precedent. The case presents no important question which has not been but should be settled by this Court.

I.

The Decision of the Circuit Court of Appeals in this Case does not Conflict with the Applicable Decisions of this Court, of other Federal Courts, of State Courts, or of Federal Administrative Tribunals.

The decision of the Circuit Court of Appeals upholding Regulations 1894 and 1899 of the Board, (R. 69-74) followed the applicable decisions of this Court, other Circuit Courts of Appeals, state courts and government administrative agencies recognizing and approving rules and regulations which have placed restrictions and limitations on futures trading.

Thus, in *United States* v. *New York Coffee & Sugar Exchange, Inc.*, 263 U. S. 611, the Court, in an opinion by Chief Justice Taft, upheld against attack under the anti-

trust laws, the rules and regulations of the New York Coffee and Sugar Exchange which permitted the liquidation of exchange contracts without delivery and by the setting off of purchases against sales through clearance by the affiliated Sugar Clearing Association. (Transcript of Record, p. 71, *U. S.* v. *New York Coffee and Sugar Exchange,* U. S. Supreme Court No. 331, October Term, 1923). The Court there said (263 U. S., pp. 619, 621):

> "* * * the rules and organization of the Exchange and Clearing Association are very like those of the Chicago Board of Trade and similar Exchanges for the sales of commodities for future delivery."
>
> * * *
>
> "The usefulness and legality of sales for future delivery and of furnishing an Exchange where under well-defined limitations and rules the business can be carried on, have been fully recognized by this Court in *Board of Trade* v. *Christie Grain & Stock Co.,* 198 U. S. 236, 246. * * * The machinery of such an exchange has been at times made the means of promoting corners in the commodity dealt in by such manipulators and speculators, thereby restraining and obstructing foreign and interstate commerce. In such instances, the manipulators subject themselves to prosecution and indictment under the Anti-Trust Act. *United States* v. *Patten,* 226 U. S. 525. But this is not to hold that such an Exchange with the facilities it affords for making contracts for future deliveries is itself a combination and conspiracy thus to restrain interstate and foreign trade."
>
> * * *
>
> "The Government contends that the prayer of the petition is justified by the decision of this Court in the case of *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. * * * But nothing in the case sustains the view that those promoting and operating such an Exchange are themselves imposing a burden or restraint upon interstate commerce for which they may be indicted under the Anti-Trust Act, or from continuing which they may be enjoined."

And, in *Chicago Board of Trade* v. *U. S.* (1928), 246 U. S. 231, this court held that the "Call Rule" of the Board of Trade which limited the time and the price of offers for cash grain by members of the Board of Trade was not a violation of the anti-trust laws.

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 217, this Court in discussing with approval its decision in *Chicago Board of Trade* v. *United States, supra*, 246 U. S. 231, stated, among other things:

> "And among its effects ["Call" rule] was the creation of a public market for grains under that special contract class, where prices were determined competitively and openly."

Circuit Courts of Appeals have recognized upon common law principles, the general power to close trading and provide a means for settling existing exchange contracts in an emergency vested by necessity and convention in all commodity exchanges as a means for dealing with an emergency of this sort. In *Crowley* v. *Commodity Exchange* (1944), 141 F. 2d 182, 185, the Circuit Court of Appeals for the Second Circuit in sustaining the exercise of such power, said:

> "* * * There is no doubt of the general power of the Board of Governors of the Exchange to compel members and their customers to cease trading and accept a reasonable settlement of their contracts. In *Thomson* v. *Thomson*, 315 Ill. 521, 146 N. E. 451, the Illinois Supreme Court held that a rule of the Chicago Board of Trade conferring upon its Board of Directors the power to regulate 'the use of the Exchange rooms' was sufficient authority for the Board to suspend trading in corn futures after the entry of the United States into World War I and order the settlement of all open contracts at a reasonable price. This doctrine was expressly affirmed in *Garcia Sugars Corp.* v. *New York Coffee & Sugar Exchange, Inc.*, Sup., 7 N.Y.S. (2d) 532, affirmed w. o. op. sub. nom. *Rifkind* v. *New York*

Coffee & Sugar Exchange, Inc., 258 App. Div. 871, 16 N.Y.S. (2d) 1023, regarding a suspension of sugar trading due to the operation of the Jones-Costigan Quota Law. In the present case, § 103 of the By-Laws grants to the Board of Governors control over the Exchange rooms and power to 'adopt such rules and regulations as it may deem advisable for carrying out the objects of the Exchange'; and § 408 gives the Board power with or without notice to close the Exchange for trading or all business or to suspend trading, 'as may, in its judgment, serve to promote the best interests of the Exchange or of the public.' Hence the resolution of July 28 ordering the suspension of trading was undoubtedly valid."

"Under the authorities cited, the general corporate authority of the Governors would also sanction the liquidation procedure; * * *."

In *Daniel* v. *Board of Trade* (1947), 164 F. 2d 815, 819, the Circuit Court of Appeals for the Seventh Circuit said:

"* * * Acting under Rule 251 [emergency rule] which was binding upon the plaintiffs, the Board had a right to stop trading in the plaintiffs' futures and to liquidate them, as it did."

In the face of these decisions sustaining the general powers of exchanges to stop trading in an emergency and to provide a means for settling or liquidating existing exchange contracts, it indeed would be anomalous for it now to be held that the exercise of such powers duly invoked, violated the Federal anti-trust laws. The existence of such powers long ago was recognized in the state courts. In *Thomson* v. *Thomson* (1925), 315 Ill. 521, 146 N. E. 451, the plaintiff had contracted to purchase on the Chicago exchange a quantity of corn for delivery in July 1917. War broke out with Germany, and an abnormal demand for grain developed in this country. The Board of Trade adopted a regulation stopping trading in July corn as of the close of July 5, 1917, and ordering that existing contracts calling

for the delivery of such corn be settled without delivery at market prices on July 5, 1917. Between July 5 and July 31, 1917, when delivery was due, prices of corn rose 75¢ per bushel. The Supreme Court of Illinois held that all traders were bound by the emergency regulation. See, also, *Garcia Sugars Corp.* v. *New York Coffee & Sugar Ex-Change, Inc.* (1938), 7 N. Y. S. 2d 532, 534, aff'd w.o. op. 258 App. Div. 871, 16 N. Y. S. 2d 1023.

Consistently, in *Cargill* v. *Board of Trade of the City of Chicago,* CEA Docket No. 6,[10] the Commodity Exchange Commission, comprised of the Secretaries of Agriculture and Commerce and the Attorney General, sustained as a proper discharge of duties imposed upon the governing board of the Board of Trade by Section 5(d) of the Commodity Exchange Act, 7 U. S. C., Sec. 7(d), the adoption of an emergency regulation stopping trading in September 1937 corn futures and ordering all then existing contracts in that future to be terminated without delivery upon a monetary basis. The Business Conduct Committee of the Board of Trade had found that Cargill was attempting to run a corner in September 1937 corn futures, and ordered Cargill to take remedial steps. Cargill refused to do so, and the emergency regulation was adopted. Cargill then filed a complaint with the Commission charging that the action of the Board in adopting the regulation violated the Commodity Exchange Act. The Commission rejected this contention, and held that the action taken in the emergency by the Board was not a burden upon interstate commerce, but in aid of that commerce and the policy of the Act.

---

[10] A copy of the findings and decision in this case duly certified by the Department of Agriculture has been lodged with the Clerk of this Court.

A. The Respondents did not fix prices.

The petition for certiorari advances the contention that Regulations 1894 and 1899 constituted "price-fixing", because of those provisions thereof which ordered the liquidation or termination of existing exchange contracts to be at prices prevailing when trading was stopped under the Regulations (Pet., p. 10). The petition states that but for the adoption of these Regulations, "the prices of such contracts would have varied from day to day and from minute to minute", and, accordingly, these Regulations fixed prices (Pet., p. 10).

That part of Regulations 1894 and 1899 which provided for the liquidation or termination of existing exchange contracts at prevailing ceiling or market prices, did not constitute "price-fixing". The price of grain to be purchased and sold on that exchange was not fixed, nor were factors determinant of such price eliminated. The price contained in the exchange contracts which were the subject of these Regulations, had been determined openly and competitively on the floor of the exchange. The price to be reached in exchange contracts not coming under these Regulations similarly would be determined openly and competitively. These Regulations merely provided measures for the settlement of existing exchange contracts, the liquidation or termination of which was incident to and required by the resolution of a market emergency.

This case involves nothing more than the termination or liquidation of certain contracts and the settlement of liabilities thereon in the manner agreed to by the parties themselves, as an incident to the stopping of trading in certain grains in an emergency. There was obviously no tampering with any price structure and no attempt to fix

or alter in any way the price at which trading either for cash or future delivery might be carried on thereafter.

All future contracts on the Board of Trade contemplate delivery. But they also contemplate the exercise of the power to stop trading in an emergency and to order the contracts settled on a monetary basis without delivery. Both parties to every futures contract so agree. In *Crowley* v. *Commodity Exchange* (1944), 141 F. 2d 182, the court, in upholding the right of that exchange to stop trading in and order a settlement of silk futures contracts on a monetary basis, said at page 189:

> "• • • While it is true that the By-Laws of the Exchange intended delivery under the contracts, one of the necessary terms of each contract was that it could be settled and liquidated by the Board of Governors in such contingencies as are contemplated by § 409. This follows from the provision which states, 'This contract is made in view of, and in all respects subject to the By-Laws of the Exchange. There hence were alternative methods of performance; and it is well settled that when a contract provides for one of two alternatives, impossibility of performance of one alternative does not excuse the promisor from performing the other. *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 47 S. Ct. 142, 71 L. Ed. 294; 6 Williston on Contracts, Rev. Ed. 1938, § 1961."

The case of *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, relied upon by petitioner, is readily distinguishable. In that case, the activity condemned as price-fixing consisted of a combination among like business interests to raise the price of a commodity *to be sold* in a market, by removal from the market of certain factors having an adverse competitive effect upon such price. Here, Regulations 1894 and 1899 were not aimed at and had no effect upon the prices of grain contracted to be purchased or sold in the open delivery months. They dealt

with contracts already made, the liquidation or termination of which was ordered to be settled by a monetary payment referable to existing ceiling or market prices. The basis of settlement was incidental to and a necessary result of the closing of trading in certain futures. It was, in effect, merely the decision of an arbitrator (i. e., the governing board) authorized by the contracting parties to determine a basis for settlement of their rights in the event of an emergency.

B. The Restraint of Trade, if any, was Reasonable.

It is apparent from the foregoing discussion that Regulations 1894 and 1899 did not impose unreasonable restraints upon trade in grain. As already stated, both Regulations were exercises of that inherent power to close trading and provide a means for settling existing exchange contracts, vested by necessity in all commodity exchanges as a means for dealing with an emergency directly affecting their operations. In Regulation 1894, recognition was given temporarily upon request of the Government to a declared governmental policy, but such recognition was withdrawn without injury to petitioner following the failure of the Government to impart to its policy the force of law. The governmental request was made in the aftermath of the War and in the midst of conditions of emergency.

The respondents, when they adopted Regulation 1899, had determined that a proper market no longer existed in the specified futures and that deliveries were "impossible" (within the standards envisaged by the Commodity Exchange Act). It then became their duty to close those futures. The governing board of a contract market must, of necessity, have the power and authority to limit trading and in great emergency to close a future when conditions

become such that a proper market no longer exists. If the power to close or to restrict futures trading in an emergency were lacking, the governing board of a contract market would be powerless to prevent price manipulation, cornering of the market, and other evils sought to be prevented by the Commodity Exchange Act.

The adoption and enforcement of both Regulations, fall directly within the holding in *Chicago Board of Trade* v. *U. S.* (1918), 246 U. S. 231, which applied the "rule of reason" to the restraint involved.

II.

This Case does not Present Important Questions of Federal Law which have not, but should be, Settled by This Court.

This case involves only the inherent right of a commodity exchange to close futures trading and order contracts therein settled when conditions similar to those involved herein are found to exist.

The necessity for and the validity of the use of this power under such conditions has been universally recognized and approved. *Crowley* v. *Commodity Exchange* (1944), (CCA 2), 141 F(2d), 182; *Daniel et al.* v. *Board of Trade* (1947), 164 F. 2d 815; *Thomson* v. *Thomson* (1925), 315 Ill. 521, 146 N. E. 451; *Cargill Inc.* v. *Board of Trade of the City of Chicago* (1940), CEA Docket No. 6. The rules and regulations of a commodity exchange authorizing its governing board to take such action, do not violate the anti-trust laws. *Chicago Board of Trade* v. *U. S.* (1918), 246 U. S. 231; *United States* v. *New York Coffee and Sugar Exchange* (1924), 263 U. S. 611.

Conclusion.

The judgment of the District Court below and its affirmance by the Circuit Court of Appeals were fully in accord with the principles laid down by this Court, and were in harmony with the decisions of federal and state courts and of the Commodity Exchange Commission.

Since the facts upon which the petitioner bases its claim under the anti-trust laws are pled with particularity in its Amended and Supplemental Complaint, and such facts disclose affirmatively the non-existence of any right under those laws, the cause was adjudicated properly below on the pleadings.

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

WEYMOUTH KIRKLAND,
HOWARD ELLIS,
WILLIAM H. SYMMES,
ANDREW C. HAMILTON,
BENNITT E. BATES,
Attorneys for respondents Board of Trade of the City of Chicago, Board of Trade Clearing Corporation, and certain other respondents,
Chicago 2, Ill. RAN 2929
33 N. La Salle St.

WALTER BACHRACH,
WALTER H. MOSES,
STANLEY MORRIS,
Attorneys for respondents Frank A. Miller and Emmet G. Barker,
231 S. La Salle St.
Chicago 4, Ill. STA 6862

FLOYD E. THOMPSON,
FREDERICK MAYER,
ABRAHAM L. RITTENBERG,
Attorneys for Respondent J. O. McClintock,
11 S. La Salle St.
Chicago 3, Ill. RAN 0220